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DOCTRINE OF MILITARY NECESSITY

BY

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THESIS

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INTRODUCTION.

Since the outbreak of the World War it has been frequently stated that the fabric of international law has been all but destroyed; and the old barbarous methods of making war seem to have been revived in the modern civilized world.

It is a fact that the history of the war during the past three years is full of examples of violations of the most sacred and fundamental provisions of the Laws of War, although no belligerent has denied the existence of international law as a body of rules binding upon them.

However, it is very interesting to note, wherever there have been violations the violating belligerent has sought to justify its conduct on the ground of military necessity or because of alleged prior breaches of law by its enemies. Military necessity and retaliation are two totally different subjects which, in my opinion, have to be kept strictly separate. I have assayed the task only of investigating the former subject. As to the latter, it does not concern the purpose of the present discussion; and it will not therefore be considered in this paper.

For convenience of study, it will be well first to consider the question of self-preservation upon which the so-called German doctrine of kriegsraison purports to rest, next to discuss the fundamental principles underlying the modern law of belligerent operations and also the principle of military

necessity as understood by the civilized nations; in the third place, we will consider the doctrine of kriegsraison which is put forward by German writers and officially countenanced by the German Government; then to investigate its application and determine to what extent such necessity may conceivably justify severe measures. With this object in view and roughly corresponding to the division just made, we have divided our treatment into the following chapters:-

- I. Necessity of Self-preservation.
- II. Laws of War and Military Necessity.
- III. German Doctrine of Necessity: Kriegsraison.
- IV. Application of Kriegsraison in the present War.

CHAPTER I

NECESSITY OF SELF-PRESERVATION

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CHAPTER I

NECESSITY OF SELF-PRESERVATION

The most important of the fundamental rights of states is that of self-preservation. It is the first law of nations. It underlies all positive rules and customs, and takes precedence of all other rights and duties. This is a principle recognized and maintained by nearly all the authorities on international law. Twiss, for example, states that "of the primary or absolute rights of a nation the most essential, and as it were, the cardinal right, upon which all others hinge, is that of self-preservation. This right necessarily involves, as subordinate rights, all other rights which are essential as means to secure this principal end."⁽¹⁾ Henry Wheaton, says that "of the absolute international rights of states, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other states but a duty with respect to its own members, and the most solemn and important which the state owes to them. This right necessarily involves all other incidental rights which are essential as means to give effect to the principal end."⁽²⁾ Carlos Calvo, a Latin American writer, says "One of the essential rights inherent in the sovereignty and the independence of states is that of self-

(1) The Law of Nations in Time of Peace (1861) p.144, Sec. 99

(2) Elements of Int. Law (1889) p.82.

preservation. This right is the first of all absolute or permanent rights and is the fundamental basis of a great number of accessory, secondary or occasional rights." (1) Rivier, a noted Swiss-Belgian scholar, says "these rights of self-preservation, respect, independence and mutual trade, which can all be carried back to a single right of self-preservation, are founded on the very notion of the state as a person of the law of nations. They form the general statute (loi) of the law (droit) of nations and common constitution of our political civilization. The recognition of a state in the quality of a subject of the law of nations implies ipso jure the recognition of its legitimate possession of those rights. They are called the essential or fundamental, primordial, absolute, permanent rights, in opposition to those arising from express or tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights." (2) John Westlake, one of the recent leading English authorities, declares that "The writers on international law often class the principle of self-preservation among their fundamental, primitive, primary, or absolute rights. It is no doubt a primitive instinct, and an absolute instinct so far as it has not been tamed by reason and law, but one great function of law is to tame it." (3)

From these opinions of the leading writers of different countries, it is quite clear that the right of self-preservation

(1) Le Droit Theorique et pratique, 5th ed. Vol. I Sec.208.

(2) Principes du Droit de Gens (1896) Vol. I p.257

(3) L. Oppenheim - Collected papers of John Westlake (1914)p.112

is primary, absolute, instinctive, permanent and fundamental. This right of state in the eyes of international law is to be understood in the sense in which the right of an individual to defend himself against an unlawful attack of the assailant threatening the life of the unlawfully attacked. It is in this sense that Hobbes emphasizes the 'ius necssitatis'; "if a man by the terror of present death be compelled to do a fact against the law, he is totally excused; because no law can oblige a man to abandon his own preservation."⁽¹⁾ Corresponding to the individual right of self-defense the corporate person of every state is vested with the inherent right of self-preservation. Thus Bonfils says, "La conservation de soi-meme est un 'devoir' pour les Etats."⁽²⁾ Rivier declared that "the excuse of necessity has always been allowed to private persons; a fortiori it will not be refused to states".⁽³⁾ It is for this reason that a state, in order to protect and preserve its existence, may, in case of extreme necessity, commit what would ordinarily be an infraction of the law of nations and violate the territorial sovereignty or international right of another state. These infractions and violations in self-preservation are not prohibited by the law of nations, they are excused or justified in cases of necessity. However the excuse of necessity is by no means universally accepted. To some publicists, it is theoretically unsound and practically dangerous; to some others it is not permissible because it is liable to abuse. Still other writers such as Halleck and Calvo, while admitting the right of self-preservation

(1) Coleman Phillipson - Int.Law & The Great War (1915) p.30

(2) Droit- International public, sec. 242.

(3) Principes, Vol. I p.278.

by means of acts violating the sovereignty of another state, deny that it is a "pacific right". They regard any invasion of a state's territory as "imperfect war". But in general, most of the authorities on international law recognize that the violations of other states in the interest of self-preservation are excused in cases of urgent necessity. It will be seen from the following opinions of the most prominent authorities that the right of self-preservation takes precedence of all other rights and duties. It is inalienable; and it can not be lost or bargained away.

(1)

Hugo Grotius, who is universally recognized as the Father of international law, says:-

"Necessity, the protectress of human infirmity, breaks through all human laws and all those made in the spirit of human regulations.-----In the prosecution of a just war, any power has a right to take possession of neutral soil if there be real grounds, not imaginary fears, for supposing the enemy intends to make himself master of the same, especially if the enemy's occupying it would be attended with imminent and irreparable mischief to that same power."

(2)

Sir Robert Phillimore, a famous English jurist, has the following to say on this subject:-

"The right of self-preservation is the first law of nations, as it is of individuals-----It may happen that the same right may warrant her in extending precautionary measures without limit, and even in transgressing the borders of her neighbor's territory. For international law considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right."

(3)

Another famous English jurist, Travers Twiss, has the similar expression on the use of neutral soil:

(1) Law of War & Peace Vol II ch. 2 Par. 10.

(2) Int. Law (1879) ch. 10 (CC XI)

(3) Law of nations - p. 149, Sec. 102.

"When the safety of the state is at stake, the right of self-preservation may warrant a nation in extending the precautionary measures beyond the limits of its own dominions, and even in trespassing with that object on a neighbor's territory. As the right of self-preservation is prior and paramount to the right of dominion and property, in the case of individuals, so the right of self-preservation is prior and paramount to the right of territorial inviolability in the case of nations, and if ever these rights conflict the former is entitled to prevail within the limits of the necessity of the case."

(1)

Edward William Hall, another English jurist, says:

"The right of self-preservation in some cases justifies commissions of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effects by an enemy, when there is a known intention on his part so to make use of it, and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party in it."

(2)

Oppenheim, one of the leading English authorities today, gives the following opinion on the violation of neutral territory:

"It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. It is frequently maintained that every violation is excused as long as it was caused by the motive of self-preservation, but it becomes more and more recognized that violations of other states in the interest of self-preservation are excused in cases of 'necessity' only. Such acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defense, because otherwise the acting state would have to suffer or have to continue to suffer a violation against itself."

Now, let us examine the opinions of the American writers.

(3)

Francis Wharton, in his "Digest of International Law", says:

"Intrusion on the territory or territorial waters of a foreign state is excusable when necessary for self-protection in matters of vital importance, and when no other mode of relief is attainable."

(4)

George B. Davis, another American writer, says:

(1) A treatise on Int. Law P. 273

(2) Int. Law - (1905) p. 178

(3) (2nd ed.) Vol. I Sec. 17, 50 and 58.

(4) Elements of Int. Law (1908) p.93.

"This is called into being whenever the corporate existence of a state is menaced and corresponds to individual right of self-defense. The danger may be internal, as in case of insurrection or rebellion, or external, as in case of invasion, either real or threatened. The right of self-preservation is the first law of the nations, as it is of individuals. A society which is not in condition to repeal aggression from without is wanting in its principal duty to its members of which it is composed, and to the chief end of its institution."

(1)

Hannis Taylor, in his work on international public law, has the following expression:

"In the corporate person of every state is vested the inherent right of self-preservation which, when exercised in a defensive form, embraces not only all those means through which each independent political community guards its territory from actual invasion, and the person and property of its citizens, at home and abroad, from injustice and violence, but also the permissible measures through which such a community may take defensive action either within foreign territory or in non-territorial waters when either is unlawfully employed as a starting point for attacks against it."

The excuse of necessity for self-preservation is recognized not merely in England and United States but in other countries as well. Andres Bello, who may be considered representative of Latin American thought and practice, says:

(2)

"There is no doubt that every nation has the right of self-preservation and is entitled to take protective measures against any danger whatsoever; but this danger must be great, manifest and imminent, in order to make it lawful for us to exact by force that another nation alter its institutions for our benefit."

(3)

Rivier gives the following opinion:

"When a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the state of which the destinies are confided to it. The government is then authorized, and even in certain circumstances bound, to violate the right of

(1) (1901) P.405

(2) Principios de Derecho de Gentes. Pt. I, Ch.I, VII.

(3) Principes du droit des gens - pp.277-278.

another country for the safety of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse.-----"

The above quotations from the leading authorities show convincingly that a state while in extreme necessity of self-preservation is fully justified in committing any action which would constitute a wrong and violation of international law under normal conditions. In civil actions, for example, the plea of urgent necessity might be admissible as a defense. Similarly it might in certain circumstances operate to excuse particular acts otherwise falling within the sphere of criminal law. And such acts must have direct reference to the immediate demands of self defense. That is, when there is no way of escape from an assailant, acts of self-defense resulting in the latter's death will fall within the class of justifiable homicide, provided that no more force was used by the person attacked than was necessary, that the attack could not reasonably have been averted by anything less than the means adopted, and that the nature of the counter-attack was not more serious than that of the attack. Apart from this extreme case of self-defense, there can be no justification for an act of homicide. Like these justifiable exceptions in municipal law, there are international cases in which the violation of the rights of another state may be excused, on the grounds of self-preservation. But for this it must be shown that injury of a very grave character was threatened; that there was no other means of avoiding it; and that nothing was done in excess of the requirements of self-preservation. Under other conditions there can not be any justi-

fication for an act of violence against a friendly or neutral state. In spite of this understanding the reason of things makes it necessary for every state to judge for itself when it considers that a case of necessity has arisen, and it is therefor impossible to lay down any definite rule regarding the question when a state may or may not have recourse to self-help which violates the rights of another state. Everything depends entirely upon the circumstances and conditions of the special case which occurs in practice, and it is therefore of value to examine some historical instances so far as they have involved the plea of necessity for self-preservation.

CASE OF THE SEIZURE OF THE DANISH FLEET.

One of the most remarkable instances of the violation of the rights of another state on the ground of self-preservation was the seizure of the Danish fleet by England in 1807. At that time the Danes were in possession of a considerable fleet; they had no army capable of sustaining an attack from the French forces then massed in the north of Germany. After the treaty of Tilsit the British government became cognizant of the existence of some secret articles of this treaty that France should be at liberty to seize the Danish fleet and to use it against Great Britain which was then waging war against France. If possession had been taken, the British position would have been greatly endangered. On the other hand the French forces were within easy striking distance; orders were in fact issued for the entry of the corps of Bernadotte and Davoust into Denmark before Napoleon became aware of the despatch, or even of the intended despatch, of an English expedition. Under these circumstances the British government demanded that Denmark should deliver up her fleet to the custody of Great Britain, and that, 'if the demand be acceded to, every ship of the navy of Denmark shall, at the conclusion of a general peace, be restored to her in the same condition and state of equipment as when received under the protection of the British flag.' And at the same time the means of defense against French invasion and a guarantee of her whole possessions were offered to Denmark by England. Denmark, however, refused to comply with the British demand, whereupon the British government considering that a case of necessity of self-preservation had

(1) See Oppenheim, Vol.I 179, Westlake, Vol.I,315 and Hall, Sec.86

arisen, shelled Copenhagen, and seized the Danish fleet. This exercise of the right of self-defense has been justified by the best authorities of Great Britain but it has been frequently condemned by continental writers.

(1)

CASE OF AMELIA ISLAND.

Amelia Island, at the mouth of St. Mary's River in Florida, and at that time belonging to Spain but very near to the boundary of Georgia, was seized by a band of buccaneers, under the direction of an adventurer named McGregor, who in the name of the insurgent Spanish colonies of Buenos Ayres and Venezuela preyed indiscriminately on the commerce of Spain and the United State. In the language of Mr. Adams, secretary of state of the United States, the buccaneers "assumed an attitude too pernicious to the peace and the prosperity of this union and of its citizens to be tolerated." The Spanish authorities made "a feeble and ineffectual attempt to recover possession of the island", and the nuisance was one which required immediate action. President Monroe called his cabinet together in October 1817 and directed that a vessel of war should proceed to the island and expel the marauders, destroying their work and vessels. This expedition was followed by protests, not merely from Onis, the Spanish minister at Washington, but from Pazos, the agent of the as yet unrecognized Spanish-American colonies. However the United States maintained that necessity justified an invasion of foreign territory so as to subdue an expected assailant, and on this ground may be sustained the

(1) See Oppenheim, Vol. I, 180; Westlake, Vol. I, 314 and Wharton, International Law Digest, Vol. I, sec. 50a.

expedition against Amelia Island, and other similar cases such as the seizure of St. Marks, Pensacola and other Florida posts.

(1)

CASE OF THE "CAROLINE"

Another important illustrative case is that of the "Caroline". In 1838, during the Fenian raids in Canada, a large body of Canadian insurgents and the United States sympathizers had assembled in the state of New York, where they obtained small arms and twelve guns by force from an arsenal, fired shots across the river Niagara into British territory, and where preparations were made for a descent on Canada, by means of a small steamer called the "Caroline". This vessel was employed by the mean at Black Rock and on Navy Island in communicating with the mainland. On the 29th of December its destruction took place. According to the deposition of the master, the "Caroline" left Buffalo on the 29th of December for the port of Schlosser, which was also in New York. On the way he caused a landing to be made at Black Rock and the American flag was run up. After the steamer left Black Rock a volley of musketry was fired at her from the Canadian side, but without injuring her. She then landed "a number of passengers" at Navy Island, and arrived at Schlosser about 3:00 P.M. Subsequently, in the same afternoon, she made two more trips to Navy Island, and returned finally to Schlosser about 6:00 P.M. During the evening about 23 persons, all

(1) See Oppenheim, Vol. I, 180; Westlake, Vol. I, 313; Wharton, 50c; Hall, sec. 84; J. B. Moore, Digest of International Law, Vol. II, 24, 409; Vi, 261, and VII, 919.

citizens of the United States, came on board and asked to be permitted to "remain on board all night." At midnight about 70 or 80 armed men boarded the steamer and attacked the persons on board with muskets, swords, and cutlasses. The "passengers and crew" of whom there were in all 33, merely endeavored to escape. After this attack the assailing force set the steamer on fire, cut her loose, and sent her adrift over the Niagara Falls. Only twenty-one of the persons on board had since been found, and one of these, Amos Durfee, was killed on the dock by a musket ball. Several others were wounded. Twelve were missing. After the "Caroline" was set adrift beacon lights were seen on the Canadian side, and cheering was heard, and it was not doubted that the assailants belonged to the British force at Chippewa. (1)

On receiving information as to this violation of American sovereignty the United States Government. called on the British Government to show a necessity for self-defense, instant, overwhelming;--leaving no choice of means and no time for deliberation;-- and also that nothing was done in excess of the requirements of self-defense. In the negotiations which ensued Great Britain complained that a hostile expedition had been permitted by the United States Government to organize on American territory without any effort being made to suppress it; and that American citizens had supported the seditious movements directed against the safety of Canada. The United States Government, on the other hand, complained that the attack on the "Caroline" was not such as was warranted by the necessity of self-defense;

that it was made upon a passenger ship at night; that it was an invasion of United States territory; and that though the case had been brought to the notice of the British Secretary for Foreign Affairs, unnecessary delay had taken place in the communication of his decision in the matter. The negotiations lasted over five years, but the matter was in the end settled amicably. The British Government expressed its regret for what had occurred, and also that an apology had not been made at the time. At the same time, so far as related to the violation of the United States territory, it maintained that there was no choice of means, because there was not time for application to the American Government; it had already shown itself to be powerless; and a regiment of militia was actually looking on at the moment without attempting to check the measures of the insurgents. Invasion was imminent; there was therefore no time for deliberation. Finally nothing had been done in excess of what the necessities of the occasion required, for the reason that the British forces had confined their action to the cutting adrift of the vessel, and so depriving the invaders of their means of access. The United States Government ultimately accepted these explanations, and the incident was closed.

(1)

CASE OF THE "VIRGINIUS"

The "Virginus" was a steamer which had been registered in 1870 in the port of New York as an American vessel and had received a certificate in the usual form; but for some time

(1) See Oppenheim, collected papers of John Westlake, p.118, Woolsey, sec. 214, Taylor, sec. 406.

prior to July 1873 she had really been owned by and employed in the service of the Cuban insurgents. In July 1873, while so employed, she left Kingston, in Jamaica, nominally for Limon Bay, in Costa Rica, but really for the coast of Cuba, and on being chased by a Spanish warship put into Port-au-Prince, in Hayti. Thence she proceeded again to the coast of Cuba, but while still on the high sea she was again chased and eventually captured on the 1st of November by the Spanish warship "Tornado". The vessel was thereupon taken into Santiago de Cuba, and the passengers and crew detained on a charge of piracy and aiding rebels. Four of her passengers were tried by court-martial on the 3rd of November, and were shot on the 4th; later, sixteen British subjects, part of the crew, were similarly tried and shot, in spite of the protests of the British consul; whilst seven others were detained in prison. Among those who were executed were nine citizens of the United States. The United States asserted that the 'Virginus' was as much exempt from interference on the high seas by another power as though she had been lawfully registered.' As agreed upon, the vessel was afterwards delivered to the United States with the American flag flying; but owing to the production of proof by Spain of her fraudulent registry, the salute to the flag was dispensed with. Spain also paid to the United States an indemnity of \$80,000. The British government also demanded and obtained compensation for the families of the executed, but did not complain of the seizure of the vessel, which was evidently regarded as justifiable on the grounds of necessity or self-defense; but after the capture no pretension of an imminent necessity of self-defense could be alleged, and it then became

the duty of the Spanish authorities to prosecute the offenders on a definite charge and according to due legal forms. The charge of piracy was absurd.

From the above study of the works of the jurists of different countries and from a review of the international cases involving the plea of necessity we may well conclude that the right of self-preservation is a recognized principle of international law. It takes precedence of all other rights and duties. But on the other hand, it is by no means unlimited. When it is exercised it is subject to certain limitations. First of all the danger should be one of a very grave and immediate character; in the second place, there should be no other means of avoiding it; and in the third place the acts done by way of self-preservation should be limited to those which are barely necessary for the purpose. It is under these conditions and within these limits that the principle of self-preservation is recognized in international law as an excuse or a justification for certain exceptional actions which would otherwise be unlawful; and only to this extent it may be said to possess the character of a legal rule or principle.

In spite of such a clear and definite established principle, the German writers such as Von Liszt, Strupp, Schoenborn, and Muller, however, go much farther than this with their so-called doctrine of necessity, and apply it, not only where self-preservation is at stake, but in all cases of military convenience and of extreme need when the object of war can not be obtained otherwise. In other words the obligation to observe

the laws of war is subject to the condition that it is consistent
(1)
with the attainment of the object of the war. With this
doctrine, Germany has justified her violation of Belgian neutrality
in 1914. We shall not discuss the case here, but will consider it
in a later chapter of this essay. For our present purpose, it
will be sufficient to say that the defense of necessity advanced
by German writers is quite different from that necessity related
to justifiable self-preservation in face of an unprovoked attack.
Therefore it is proper to have it treated in a separate place.

(1) Bordwell, Laws of War, PP. 5-6 and also DeVisscher,
Belgium's Case, a Juridical Enquiry, Translated by
E. F. Jourdain, PP. 27-28

CHAPTER II

LAWS OF WAR AND MILITARY NECESSITY.

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LAWS OF WAR AND MILITARY NECESSITY.

The laws of war are the rules of the law of nations respecting armed contests between states. The roots of the present laws of war are to be traced back to the practices of belligerents which grew up gradually during the latter part of the Middle Ages. The unsparing cruelty of the war practices during the greater part of this period began gradually to be modified by the principles of humanity and of chivalry. Again, the principle of military necessity which is really more or less implied in the principles just mentioned requires that no more force, no greater violence, should be used to carry out an operation than is absolutely necessary in the particular circumstances. From these principles, various laws of war came into existence as natural corollaries of them. A decided progress was made during the eighteenth and again during the nineteenth centuries, especially in the time from the Crimean War to the eve of the present world conflict. Within the last five or six decades, numerous attempts have been made by means of national instructions, and international conventions to arrive at a definite understanding with reference to various rules of international law and more particularly those relating to the conduct of war.

The first government to issue instructions to its armies was that of the United States during the Civil War of 1861-

1865. Afterwards this example was slowly followed by many other countries such as Prussia, the Netherlands, France, Russia, Servia, The Argentine Republic, Spain and Great Britain. (1) The instructions of these various countries differ considerably from one another. They are authoritative only for the armies of the nation by which they are issued. Therefore it may be said that they are unilateral acts; they have no international effects although some of them are substantial in accordance with the existing international law.

Those which have international effects are the existing conventions and declarations that have been enacted, ratified or adhered to by the civilized governments of the world. They are the Hague Conventions number III, IV, and V of 1907 and the Regulations thereto; Geneva Conventions of 1864 and 1906, Hague (2) Declarations of 1899 and St. Petersburg Declaration of 1868. These conventions did not pretend to provide a complete code and cases beyond their scope therefore still remain the subject of customary rules and usages preserved by military tradition and in the works of international jurists.

Now as to the binding force of the Laws of War, question is often raised: Will they stand the test of a life and death

(1) For more detailed discussion, see T. E. Holland, Laws of war on Land, pp. 71-73.

(2) See Holland also, pp. 1-10, 74-82, 138-142, also British Manual of Military Law of 1914, p.234.

struggle of nations? Will not they be set aside and the necessities of war excuse the acts which the laws of war condemn? No, indeed, as soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions except in case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed force or his other subjects. The authority of the customary law has derived from the unwritten consent of nations, as evidenced by their practice, the force of law-making treaties from the written consent given in the form of signatures. They are inviolable and subject to no casuistry. Military necessity permits no free action of military force and can have no operative force as against the positive prohibition. Most of the International Conventions, thus state the definite intention of the signatory powers:

According to the views^w of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military necessity permit, are intended to serve as general rules of conduct for belligerent in their relations with each other and with population.

It has not, however, been possible to agree forthwith on provisions embracing all circumstances which occur in Practice; on the other hand, it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders.(1)

From this quotation it is obvious that the rules of the Conventions represent the standard of conduct at which the

(1) Preamble of Hague Convention IV, Higgins, Hague Peace Conferences, p.209.

commanders are to aim. And it is with the view of diminishing the evils of war "so far as military necessities permit" that the signatory powers have adopted the conventions on the laws and customs of war. Thus the written laws of war derive their force from the express consent given in the form of signatures to the conventions. It is also plain that the signatory powers have recognized that it is impossible to agree "on provisions embracing all circumstances which occur in practice." Therefore the commanders are left as their own judges in cases when observance of the provisions becomes impossible. Although no legislation can be made to specify beforehand the precise circumstances which would justify a commander in failing to act on the rules laid down, but no circumstances can justify the violation of the fundamental principles of these rules which prohibit the infliction of needless force and violence upon persons as well as property. The commander could not ride off on the plea of military necessity; for, as Professor Westlake has been careful to point out, we have evidence in the preamble of the Hague Conventions on the subject that "military necessity has been taken into account in framing the regulations, and has not been left outside to control and limit their application." (1)

Now, let us discuss military necessity in somewhat detail. By military necessity is meant measures that are necessary for securing the end of war. It is based upon a recognized

(1) Westlake, International Law, Pt. II, p. 57.

principle that a belligerent should be justified in applying any amount and any kind of force which is necessary for the realization of the purpose of war---namely, the overpowering of the opponent. But side by side there are other principles of humanity and chivalry which say that all such kinds and degrees of violence as are not necessary for the overpowering the opponent should not be permitted to the belligerent. It is due to the fact that these principles---work together in determining the methods of warfare we find it difficult to say to what limit violence is necessary and to what extent it is unnecessary. It is a question of conditions and circumstances which occur in practice. It is an international question which has not been possible for the parties to the Hague Conventions to solve. The question is an old one; and goes back to the fourth century B.C. The Greeks, in their relations with each other, recognized certain laws or "custom of Hellenes", such as the inviolability of heralds, temple and envoys, the right of asylum, or sanctuary, and truce, for the burial of the dead. In the Peloponnesian war the Athenians had garrisoned and fortified the sanctuary of Apollo at Delium in Boeotia. The Boetians refused to surrender the Athenian dead unless Delium were evacuated. Then the Athenians entered the plea of military necessity in reply to the charge of using sacred water, but claimed that they had not injured the sanctuary. A case of this sort will not be worth while for present consideration. What we are here interested in is the military necessity as

(1) A. S. Hershey, Essentials of International Law, pp.37-38.

understood by modern civilized nations.

As just noted above, military necessity is a question of conditions and circumstances which occur in practice, and for that very reason it was not possible for the parties to the Hague Conventions to solve it. In spite of the fact, it is observable that the delegates of the civilized states assembled at the Hague and other conferences have distinctly agreed when military necessity may apply and when it may not. The regulations or conventions adopted have carefully discriminated between what is prohibited, what is permissible and what is to be followed as far as possible. This is convincingly shown in the express reservations, as regards acts otherwise prohibited, which are frequently made both by the Hague Regulations and other conventions, with the object of providing for cases of practical necessity. For instance, the seizure or destruction of enemy's property ⁽¹⁾ or cables between occupied and neutral territories, ⁽²⁾ the confiscation of private property, ⁽³⁾ the abandonment of sick and wounded; ⁽⁴⁾ the bombardments of undefended ports, towns, villages and dwellings, ⁽⁵⁾ and many other needless sufferings are all prohibited on the condition that the prohibition may be waived in case of imperative necessity of war. Apart from these express reservations, it may be well said that all other

(1) Hague Regulations, 23g

(2) Hague Convention IV, Article 54

(3) Hague Regulations, Article 46

(4) Geneva Convention, Articles 1 and 15

(5) Hague Convention IX, Articles 2 and 6

positive prohibitions, having by common agreement, are to be the technical limits at which the necessities of war ought to yield to the requirements of humanity and chivalry. Therefore military necessity as understood by modern nations is by no means unlimited.

For more definite and specific understanding of military necessity than that implied in the express reservations made by international conventions it will be of great interest for us to look into the unwritten custom and tradition preserved in the national instructions of the modern civilized governments.

The most important work of great international value is the "Instructions for the Government of the Armies of the United States in the Field" published on April 14, 1863, during the American Civil War. They were prepared by Professor Francis Lieber, an eminent jurist, and revised by a board of officers of the United States army. They were made obligatory upon the armies of the United States by their publication in the form of a general order of the war department. (1)

These instructions represent the first endeavor to codify the laws of war and they are even nowadays of great value and importance. "At the Brussels Conference of 1874, the President, Baron Jomini, declared it was they that had suggested the idea of an international war code and had thus led the Russian Emperor to convoke the Conference, and as the Project of Declaration adopted at Brussels served as the basis

(1) For detail, see Davis, International Law (1903) pp. 499-501.

of the Hague Regulations relating to the Law and Customs of War on Land, the historical importance of the instructions is evident." In regard to military necessity we will find the following provisions in section I of these instructions: (1)

ARTICLE 14 --- Military necessity, as understood by modern civilized nations, consists in the necessity, of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

ARTICLE 15 --- Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and canals of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country afford necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God.

ARTICLE 16 --- Military necessity does not admit of cruelty --- that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Although more than a generation has elapsed since these instructions were prepared, they are still in substantial accordance with the existing rules of international law upon the subject of which they treat, and form the basis of the Hague Regulations relating to the Law and Customs of War on Land. They are accepted

(1) Elements of International Law, appendix A. pp.503-504. Davis.

by text writers of authority as having standard and permanent value, and as expressing the usage and practice of nations in war. Moreover, it is the fact that the most recent manual of the United States --- Rules of Land Warfare issued by the United States War Department on April 25, 1914 and reissued after the declaration of war between Germany and the United States in the year of 1917 --- is not substantially different from that of 1863. In regard to military necessity, it says:

"The object of war is to bring about the complete submission of the enemy as soon as possible by means of regulated violence.

Military necessity justifies a resort to all the measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war."(1)

Although the wording of the sections quoted here is different from that in the instructions of 1863, it has the same meaning and the same spirit. If we compare the sections 12 and 13 of the rules of 1917 with the articles 15 and 16 of the instructions of 1863, as to what does military necessity permit and what does it not, we will find that they are exactly the same without
(2)
a slight difference.

Another manual worth while for consideration is that of Great Britain. The British Government, which has long preferred in such matters to "trust to the good sense of the British Officers" was at last induced to change its policy. In 1883 the War Office,

(1) Rules of Land Warfare, Ch. I, sections 10 and 11, may be found in Complete U.S. Infantry Guide, 1917, PP. 1715-1716

(2) Sections 12 and 13 of the Rules, 1917, also in the Complete U.S. Infantry Guide, P. 1716; Articles 15 and 16 of Instructions 1863, quoted elsewhere in this paper.

for the first time, issued the "Manual of Military Law" in which a chapter on the "custom of war" has inserted. It was compiled by the late Lord Thring from the ordinary textbooks on the subject. It was however stated to have "no official authority" and to express "only the opinion of the compiler as drawn from the authorities cited." (1) It was not till 1904 that the Secretary of State for War was induced to depart from this cautious attitude, and to entrust to Professor Thomas Erskine Holland to prepare the "Handbook of the Laws and Customs of War on Land". In this Handbook we will find the following provision about the subject of military necessity:

"The object of war is to bring about the complete submission of the enemy, as speedily as may be, and with the least possible loss of life and damage to property.

Military necessity justifies a resort to all measures which are indispensable for securing this object; provided that they are not inconsistent with the modern laws and usages of warfare.

These laws and usages prohibit all needless cruelty, and even needless destruction of human life.

They permit, on the other hand, that an invading army may, on grounds of military necessity, devastate whole tracts of country, burning dwellings, and clearing the district of supplies. In this case it is, however, the duty of the invader (2) to make the best provision he can for the dispossessed population."

Many thousand copies of this Handbook were issued by the authority to the British army in the same year. They were accepted by the English jurists and publicists of authority, and served as a groundwork for the new "manual of Military Law" issued at the beginning of the present European War in 1914. In regard to

(1) T. E. Holland, The Laws of War on Land (1908) P. 73

(2) " " " " " " " " PP.12-14
also his Handbook of the Laws and Customs of War on Land,
(1904) pp. 3-4, section II, Articles 5, 6, and 7.

military necessity this manual has a still more strict provision; it says:-

"In extreme cases an act may sometimes be justified on the plea of necessity, if it is done by a person in order to avoid inevitable and irreparable evil to himself or those whom he is bound to protect, though, of course, the act must not be disproportionate to the end to be attained, nor must more be done than is absolutely necessary to attain that end. Thus if the captain of a steamer, without any fault on this part, finds himself in such a position that he must either change his course or run down a boat with twenty people in it, he is justified in changing his course, although by so doing he runs a risk of swamping a boat
(1)
with two people in it."

From the above study of the manuals of the United States and Great Britain it may be well said that military necessity is again limited in the sense that it only justifies a resort to all the measures which are indispensable for securing the ends of the war, and which are not "forbidden by" or "inconsistent with" the modern laws and customs of war. Moreover, it is in this limited sense that the military necessity is understood and recognized by other nations of the civilized world. The French 'Manual de Droit International a l'usage des officiers de l'armee de terre', the "Instructions for the Russian Army respecting the Laws and Customs of War on Land", the Spanish "Cartilla de leyes y usos de la guerra" and the manuals of a great many other countries confirm the same view, maintain the same principle, and permit no free action to

(1) Manual of Military Law - 1914 - p.88 - Sec. 12.

their military force without restriction.

Nevertheless, the German manual --- Kriegsbrauch im Landkriege --- issued by the Great General Staff, in 1902, proceeds upon another theory, ⁽¹⁾ and it is diametrically opposed to that which is held by all other nations. Indeed, German authorities have gone the farthest in permitting the freest action to military force when necessary to attain the ends in view. As to military necessity, the Kriegsbrauch has countenanced the so-called doctrine of Kriegsraison. It is observable that there is no English word which exactly expresses this conception. It is usually given a term as "necessity of war". But, however, Professor Morgan has a different translation. He says, "kriegsraison I have translated as the 'argument of war'. 'Necessity of war' is too free a rendering, and when necessity is urged 'notig' or 'notwendigkeit' ⁽²⁾ is the term used in the original." No matter which term is more equivalent to the German word of kriegsraison, but what makes havoc of the Laws and Customs of War is the same doctrine. This doctrine of kriegsraison, in effect, has a different function as compared with the plea of necessity which we have just discussed at a great length; and it is the military necessity, which the German Imperial Chancellor told the world in 1914, "knows no law". To do justice to the German doctrine, I have though best to treat it in the following two chapters. In the next chapter will be undertaken a discussion of the doctrine as maintained by German authorities.

(1) For critical discussion, see J. H. Morgan, The German War Book, chapter I, pp. 1-10.

(2) J. H. Morgan, The German War Book, p. 4 note.

CHAPTER III

GERMAN DOCTRINE OF NECESSITY : KRIEGSRAISON.

CHAPTER III.

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GERMAN DOCTRINE OF KRIEGSRAISON

Having considered the necessity of self-preservation in international law and military necessity as understood by modern nations, we come now to a new topic, namely, the german doctrine of kriegsraison. Before taking up the discussion of the main subject we must bear in mind that this doctrine is not to be confounded either with the necessity related to justifiable self-preservation as in the cases discussed in the first chapter of this essay; or with military necessity in the sense in which that is understood to sanction generally the destruction of life and limb and property, so far as the objects of war may require, and in so far as may be lawful according to the laws and usages of war; nor to be confused with those exoress reservations as regards acts otherwise prohibited, which are frequently made by the Hague regulations and other conventions, with the object of providing for cases of practical necessity.

The doctrine of kriegsraison is put forward by a number of German writers who refused to recognize the laws and customs of war as imposed by any external authorities. By "kriegsrecht" they understand "not a lex scripta introduced by international agreements, but only a reciprocity of mutual agreement; a limitation of arbitrary behaviour, which custom and conventionality, human friendliness and a calculating egoism have erected, but for the observance of which there exists no exoress sanction but only
(1)
the fear of reprisals decides." As to the "Kriegsrecht which

(1) J. H. Morgan, German War Book, P. 54.

they do admit, they always apply a doctrine of Kriegsraison which purports to rest on the paramount principle of self-preservation and on futility of requiring obedience to rules that would become inconsistent therewith. According to Strupp, kriegsraison "is founded on the supreme duty which is laid on the military command to assure the fortunate issue of the war, the defeat of the enemy." In regard to the measures authorized by this kriegsraison, De visscher says that they "have nothing in common with those imposed by self-defense. They are simply the conditions of success. Thus the plea is developed in quite a different way: the theory of a state of necessity (notstand) isolated from notwehr is now to receive a suitable application." (1)

All German writers conceive that the laws of war in general lose their binding power in case of extreme necessity; they say, "the entire law of war or Kriegsrecht is made up of two parts: first, the Kriegsmanier, the custom or usage of war, which imposes certain restrictions on the license of belligerents; and secondly, the Kriegsraison, the necessity of war which sets aside all such restrictions when their observance would be detrimental to the military operations and renders more difficult the attainment of the object for which the war was made." This distinction is an old one, for Professor Holland has carefully pointed out that Ulr. Obrecht (1697), F. V. Pestel (1758) Aluber and even Rivier had similar expressions in their respective works. As for instance, (2)

(1) De visscher, Belgium's Case, P. 38.

(2) Phillipson, International Law and the Great War, p.137
Similar translations may be found in Holland, Laws of War, P.13; Westlake, Collected Papers, p.143; and Oppenheim, International Law, Vol. II p.79

(3) Holland, Laws of War, p.13

we may quote from Kluber, he said: "Dans l'exercice des ces moyns de faire du mal, les nations civilisees des l'Europe observent generalement certaines regles quo ont pour but d'empecher qu'll ne se commette des cruates trop atroces et souvent meme inutiles. L'emsemble de ces regles forme la loi de guerre (Kriegsmanier, Kriegsgebrauch) Il ne peut etre deroge a cette loi qu'en cas de retorsion, ou dans des circonstances extraordinaires, toujours par exception et seulement dans les cas prevus par la coutume qu'on appelle la raison de guerre. (ratio belli, Kriegs-
 (1)
raison). In his book: Lehrbuch des Volkerrechts, Rivier uses Kriegsrecht in the sense of Kriegsmanier, but not exclude the (2)
 exceptional law. He says: "Kriegsraison geht vor Kriegsrecht." In his Principes du Droit des Gens, he states that "La necessite de guerre peut excuser des rigueurs que les lois de la guerre
 (3)
condamnent. Elle prime les lois de la guerre." Lueder, Ullmann, Liszt and a great majority of other German writers on politics and jurisprudence maintain the same view and emphasize the maxim that Kriegsraison geht vor Kriegsmanier. Professor Lueder who works out this doctrine of necessity in a most elaborate manner affirms that to attain the object of war all regulative limitations may be disregarded. His article in Holtzendorff's Handbuch des volkerrecht, which is usually regarded as the classical passage on the doctrine, will now have to be taken up for our consideration.

(1) Kluber, Droit des Gen Moderne de L'Europe, p.346-347.

(2) Westlake, Collected Paper, p. 244

(3) Rivier, Principes du Droit des Gens, Vol. II, p. 242.

"Kriegsraison embraces those cases in which, by way of exception, the laws of war ought to be left without observance. This can only happen in two cases, one that of extreme necessity, when the object of war can only be attained by their non-observance, the other that of retorsion, as a retaliation for an unjustifiable non-observance of the laws of war by the other side.---

"The right not to observe the laws of war exists in the case of retorsion because, according to the known maxims, non-fulfilment by one party deprives that party of the right to claim fulfilment by the other. At least this may be the case in war, where, if the violations of the laws of war by the enemy were passed without retaliation, a belligerent would be at a disadvantage and worse off than his enemy who was guilty of the violations, with reference to the end which has to be striven for by all means, namely breaking down the determination of the other side and gaining the victory.---

"As little can the justifiableness of Kriegsraison be denied on occasions of extreme necessity. If the necessity of individuals is recognized as exempting them from punishment for things never injurious done by them from that necessity, this must be still more than in war, since so much more is at stake. When therefore the circumstances are such that the attainment of the object of the war and escape from extreme danger would be hindered by observing the limitations imposed by the laws of war, and can only be accomplished by breaking through those limitations, the latter is what ought to happen. It ought to happen because it must happen, that is, because if no war will in such extreme cases be hindered and allow itself to end in defeat, perhaps in ruin, in order not to violate formal law. No prohibition can in such a case effect anything, or present a claim to recognition and validity; and it would be idle to formulate one, for from what commander or from what state could such a heroism of meekness and renunciation be expected?

"Of course such a conflict can only be of exceptional occurrence, for the laws of war are so framed by ordinary customs and well weighed conventions that ordinarily it is possible to follow them. They are built on those relations of fact which are usually met with, just as are the rules of public national law (Staatsrecht) and private law, and in one case as in the other only specially exceptional conditions can make it impossible to follow them. How should the laws of war, which have been laid down in order to afford the protection of helpless civilians, wounded and disabled soldiers, private property, flag of truce and the maintenance of conventions which have been concluded for the protection of an occupied territory against unnecessary oppression, devastation and plundering--how should such laws be lightly unobservable. That they should be so, that a conflict should arise between what the laws of war prescribe and what the necessity of war demands, is inconceivable except in quite extraordinary cases of exception and tress. It is therefore entirely out of question that Kriegsraison should be applied frequently,

lightly and at pleasure, and come to be considered as standing it its practical use on the same line with the laws of war. Much are we rather dealing only with something quite exceptionally happening, and for that reason the admission of kriegsraison certainly appears, not to be too questionable.--- When however the exception happens, it excludes the rules as its nature is to do, and kriegsraison takes precedence of the laws of war.

"The regular normal validity of the laws of war (kriegsrecht) is preserved by the introduction of kriegsraison, possible as it is only exceptionally. If this admissibility of kriegsraison in extraordinary cases of necessity and exception, an admissibility which at any rate has to be fully and decisively acknowledged, should lead one to think that there was at bottom no binding law of war, by reason of its not having to be observed in the critical cases of conflict with the demands of warfare, and that instead of a law of war there was only a usage of war in the sense condemned above (sec. 52), that would be to shoot far beyond the mark, and to ignore the final and inner cause of every law and legal institution. Kriegsraison is related to the law of war as necessity to criminal law, and it might be said with the same right and supported by the same argument that there was no criminal law, because its rules have not to be observed in the cases of necessity. The misapprehension above referred to would lead to the one conclusion as well as to the other. Thus by the full recognition of a kriegsraison exceptionally justified the doctrine which has been set forth above, that there really exists a law of war and not merely a usage of war to be observed at pleasure, is not in the least altered; and as little can there be on that account any question of right, asserted by Grotius and Pufendorf but above conuted, to free one's self from the law of war by a declaration to that effect. Even the ordinary rules of war can not be denounced at pleasure, but only disregarded exceptionally on a few well-defined grounds. If however, kriegsraison were considered as something outside law (unrechtlich) and as a breach of the law of war (kriegsrecht), even then the non-existence of a law of war could not follow, though such law would be liable to possible violation. For from this point of view also the state of things would be the same as in other departments of law, in all of which violations likewise occur, and indeed in some cases violations which are unatoned for and can not be made good."

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From the classical passage quoted above, it is quite obvious what is on the whole most significant is that the German writers insist that Kriegsraison takes precedence of the laws of war and support the same on merely two distinct grounds which we

(1) Holtzendorff, Handbuch des volkerrecht, Vol. IV, sections 65-66; translated by Westlake, Collected Papers, pp.244-6.

will discuss somewhat in detail in order to do justice to their doctrine.

In the first place, the doctrine is defended on the ground that "when the circumstances are such that the attainment of the object of the war and the escape from extreme danger would be hindered by observing the limitations imposed by the laws of war, and can only be accomplished by breaking through these limitations, the latter is what ought to happen. It ought to happen because it must happen, that is, because the course of no war will in such extreme case be hindered and allow itself to end in defeat, perhaps in ruin, in order not to violate the formal law." This ground, according to Professor Westlake, "reduces law from a controlling to a registering agency."⁽¹⁾ In reality, it means more; it creates an unconditional excuse of necessity which leads to the absolute supremacy of strategical interest and military success. "It is the *kriegsraison*," as De Visscher has carefully pointed out, "that is a *raison d'Etat* transposed into military domain. The chief characteristic of the German conception is the claim to superimpose on the legitimate and recognized exigencies of war a notion of an absolute and unconditional character--- 'transcendental', (Mittelman) which controls the very laws of war and gives authority to abandon their most formal provisions. This contention is a defiance of all juridical argument. It takes its stand in an order of ideas foreign to law, and thus escapes its criticism."⁽²⁾ But, however, we are aware of that all the acts in war are founded on necessity and the necessity of war has been taken into account in framing the Laws of War.

Therefore it is inconceivable to say what must happen ought to

(1) Westlake, International Law, Vol. II, p.115.

(2) De Visscher, Belgium's Case, a Juridical Inquiry, p.50.

happen. To use Phillipson's language, "the representatives of the states assembled at the Hague Conferences have distinctly agreed when military necessity may and when it may not apply, for their regulations discriminate what is prohibited and what is permissible and what is to be followed as far as possible.

Military necessity can have no operative force as against positive
(1)

prohibitions." Then it appears that the kriegsraison which takes precedence of law in case of necessity is not a military necessity as understood by modern nations but a means of obviating the consequences of the rules of war that stand in the way of successful prosecution of war. In other words, it is a negation of law.

In the second place, kriegsraison is supported on the ground that "if the necessity of individuals is recognized as exempting them from punishment for things never so injurious done by them from that necessity, this must be still more the case in war, since so much more is at stake. Kriegsraison is related to the laws of war as necessity to criminal law and it may be said with the same right and supported by the same argument that there was no criminal law because its rules have not to be observed in case of necessity." This ground depends chiefly on supposed analogies deduced from certain solutions provided by criminal and civil laws. According to De visscher, the German jurists, "expanding a conception contained in germ in section 54 of the penal code of the Empire, and confirmed in what are, moreover, narrow limits by sections 228 and 904 of the civil code, have tried to base a theory of notstand on

(1) Phillipson, The Great War and International Law, P. 138.

(1)

a new and purely objective argument." In our first chapter, we have pointed out that in certain cases, there may well be exemptions from responsibility for acts or omissions contrary to law. In civil actions, for example, the plea of urgent necessity might be admissible as a defense. Similarly it might in certain circumstances operate to excuse particular acts otherwise falling within the sphere of criminal law. And such acts must have direct reference to immediate demands of self-defense. It is in this limited sense and in such a subjective form that necessity is recognized as a cause of exemption from responsibility in national law of all countries. And in international law, the exercise of the right of self-preservation is also limited to the cases which are "instant, overwhelming, leaving no choice of means and no moment for deliberation." But the German objective argument which is very disoutable in national law can have no operative force in the law of nations. If lifted into region of International Law, it strikes across the fundamental principle of absolute independence and the irreducible equality of sovereign states. Their declaration that the relation of kriegsraison to kriegsmanier is analogous to that of necessity to criminal law even for granted seems scarcely valid, because, in the first place, circumstances may arise in the case of international relationships which can have no precise parrallel to those arising in relationship between private citizens; secondly, the essential guarantee provided by the presence of a regulating authority in the realm of criminal and civil law is entirely wanting in the actual organization of -----

(1) De visscher, Belgium's case, p. 41.

international relations. Therefore there is no place for notrecht in international law. If applied, it will appear to be a negation of law and will result in international anarchy.

"No one has formulated the condemnation of the theory in more severe terms than the great German jurist, Franz von Holtzendorff in his classical work, Handbuch des Volkerrecht. (Vol. II pp. 52-53) Here the conception of notrecht is denounced by him as impracticable in fact and subversive of all notions of order and of justice in international relations."⁽¹⁾

The foregoing examination of the grounds on which the German jurists have supported their doctrine of kriegsraison proves that both their supposition and analogy are not only unsound but entirely foreign to International Law. In short, their attempt of defense, as in the strong objection raised by Professor Westlake,⁽²⁾ is to border somewhat on legal casuistry. But, however, the worst is to come if we inquire about the principles maintained by them in their application to such methods of war. According to German conception, kriegsraison is a dominant and sovereign factor; everything may be sacrificed to its demands. "An army can not be said to be acting efficiently unless it constantly seeks to annihilate the enemy,--- to demolish his material possessions, to crush his physical power, to destroy his intellectual resources, to eradicate, above all, his moral force; in a word, to bring about his entire demoralization. To achieve this desirable object, every kind of intimidation, every form of frightfulness, every manifestation of unmitigated fury and violence are permissible, nay, indispensable."⁽³⁾

(1) De visser, Belgium's Case, P. 49.

(2) International Law, Vol. II, pp. 115-117

(3) Phillinson, International Law and the Great War, p. 136.

Thus Von Moltke said, "The greatest kindness in war is to bring it to a speedy conclusion. It should be allowable, with that view, to employ all methods save those which are absolutely objectionable. I can by no means profess agreement with Declaration of St. Petersburg, when it asserts that the weakening of military forces of the enemy is the only lawful procedure in war. No! you must attack all the resources of the enemy's government, --- (1) its finance, its railways, its stores and even its prestige."

The same idea has been set forth by Professor Lueder whose classical passage on the doctrine of kriegsraison we have just referred to. Now in its application, he says, "That ravage, burning devastation, even on the large scale, as of whole neighbourhoods and tracts of country, may be practised where it is not a question of any particular determinate result or strategical operation, but only of more general measures, as in order to make the further advance of the enemy impossible, or even to show him what war is in earnest when he persists in carrying it on without serious hope (frivol) and so compel him to make peace---- this can not be denied in cases of real necessity, as of a well-grounded kriegsraison." (2) That all these ideas form part and parcel of the stock-in-trade of German officialdom is shown clearly by the substance, and still more by the spirit, of the official manual---Kriegsbrauch im Landkriege---issued and reissued by the German General Staff for the German officers of the armies.

(1) Letter to Bluntschli, Dec. 11, 1880, cited Morina, War on Land, P. 12

(2) Holtzendorff's Handbuch des Völkerrecht, vol. IV, sec. 114 p. 484, cited Westlake, Collected Papers, P. 246

This German War Book is supposed to be the outcome of the rules established by the Hague Conference of 1899, but so far as the manual is concerned, the latter might never have existed. In its introduction, the War Book says, "kriegsraison permits every belligerent state to have recourse to all means which enable it to attain the object of war." (1) With this premise in view, it goes on for the most part in ostentatiously laying down unimpeachable rules but then quietly and immediately destroying them by introducing exceptions as cases of kriegsraison. It is the Kriegsbrauch in Landkriege which gives the right of killing the prisoners of war from kriegsraison; (2) which permits bombardment of not only fortresses but also every open town and village without respect to the civil population from kriegsraison; (3) which allows the compulsion of the inhabitants to furnish information about their own army, its strategy, its resources, and its military secrets from kriegsraison; (4) which justifies the summoning of civilians to supply vehicles and perform works of military character from kriegsraison; (5) which calls for every sequestration, every temporary or permanent deprivation, every use, every injury and all destructions of private property from kriegsraison; (6) which brushes away the limitations of international law

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| (1) | J. H. Morgan, German War Book, | P. 52 |
| (2) | " " " " " | P. 73-74 |
| (3) | " " " " " | P. 78, 1 |
| (4) | " " " " " | P. 117 |
| (5) | " " " " " | P. 118 |
| (6) | " " " " " | P. 124 |

in regard to requisition from kriegsraison; (1) and which violates many other rules of civilized warfare and law of modern nations from kriegsraison; (2) In effect, as Phillipson tells us, "the German Manual, by its ambiguous generalities its subtle insinuations, its arbitrary reservations, its deliberate disavowals of widely accepted principles, says to the warriors of Germany: Soldiers of the Fatherland! your government has, it is true, entered into treaties and conventions, but these treaties and conventions and usages are nought; they do not bind you when you make war. Your business is not with law; it is simply to crush the enemy by every means in your power, and as quickly and as effectively as possible. Your instructors say so---the rest of the world does not matter."

(3) Then it may be well concluded that when the German book of instructions to army officers expressly breaks down every safeguard for civilized warfare by justifying exceptions to the rules governing such warfare, we can not fail to say that the German government is more barbarous than that of any other country; for other countries which we have already noted in our second chapter do not now recognize the right of armies to make such exceptions.

(1) J. H. Morgan, German War Book, P. 134

(2) " " " " pp. 1-11

(3) Phillipson, International Law and the Great War, p. 137.

Now it may be profitable to sum up what we have said about the doctrine and reach a conclusion. According to German authorities, Kriegsrecht, the law of war, consists of two departments: Kriegsmanier, the ordinary rules of war; and Kriegsraison, that which is permitted in exceptional cases. In such case of alleged exception, they emphasize the maxim that kriegsraison geht vor kriegsmanier, that is to say, the necessity in war over-rides the rules of war. In its application, Kriegsraison gives to the belligerent the right to decide not only when the necessity exists, but also the things which are necessary ad finem belli. This view finds also clear expression in the Kriegsbrauch im Landkriege of the German General Staff and the recent literatures of a great majority of German writers. But, on the contrary, it must not be forgotten that it is not the purpose of law to enable the strong to wreck his will but to protect the weak against the strong. Until this purpose is realized international law can not be law in full development and action but only an approximation to it. The doctrine of equality of states sets forth the ideal. Can it be said that International Law recognizes the doctrine of kriegsraison? No! not only do the customary rules of war deny it but the declaration of Paris, the conventions of the Hague Conferences and the other international agreements bearing upon land and sea warfare proceed upon another theory. Can it be said that the writers on International Law accept the doctrine of kriegsraison? No! it is not at all generally agreed even among the German writers, as for instance, Bluntschli does not mention it; and Holtzendorff severely condemns it. English,

American, French and Italian writers do not acknowledge it. The protest of Professor Westlake against such a doctrine is, therefore, the most justified; ⁽¹⁾ he says, "the question raised under the term kriegsraison is not whether that code is defective or misconceived, in any of its clauses, but whether a necessity, not of war but of success, is to be allowed to break it down. It is contended in effect, however innocent may be the intentions of the authors, that the true instructions to be given by a state to its generals are: 'Succeed--- by war according to its law, if you can---but, at all events and in any way succeed.' Of conduct suitable to such instructions it may be expected that human nature will not fail to produce examples, but the business of doctrinal writers should be to check and not to encourage it. Otherwise, the most elementary restraints on war, which have been handed down from antiquity, are not ⁽²⁾ safe."

(1) Oppenheim, International Law, Vol. II, p. 79.
(2) Westlake, International Law, Vol. II, p. 117.

CHAPTER IV

APPLICATION OF KRIEGSRAISON IN THE PRESENT WAR.

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In the preceding chapters we have pointed out that the German writers and commanders have assigned to the plea of military necessity a different and much more important function through their classical doctrine and official instructions than those of other countries. The question now is what are the examples of such doctrine and instructions, which have been produced by the German soldiers since the outbreak of the World War. In the course of the present discussion it is not a matter of wonder to notice that the laws of war should be overridden by the doctrine of kriegsraison, but the wonder is that there is a further movement in respect to kriegsraison, namely, its extension over or application to a treaty to which Germany was a party and a long established law of neutrality. This is the case of the Belgian invasion of which Professor De Lapradelle of the University of Paris has carefully stated that "no violation can be imagined more concrete, more complete, more certain, more disdainful of the institution, more offensive, not only to the independence, but to the honor, of the neutral state than that with which the guardians of this neutrality punished the refusal to betray at her command the most express and well-defined obligation."⁽¹⁾

Before we take up the main question, it must be remembered that war is a contest between belligerent states and any other

(1) North American Review, Vol. 200, p. 851, Dec. 1914.

independent state has an inalienable right to remain neutral in war, and the belligerent is bound to respect this neutrality, more particularly its territorial sovereignty. We know that the inviolability of neutral territory has long been the principle of international law and reaffirmed in a convention of the Hague Conference in 1907 and ratified by formal treaties of all civilized governments. The pertinent parts of this great international code in regard to the sanctity of neutral territory are as follows:

Convention V.

Article I. The territory of neutral powers is inviolable.

Article II. Belligerents are forbidden to move troops or convoys, either of munitions of war or supplies across the territory of a neutral power.

Article X. The fact of a neutral power repelling, even by force, attacks on its neutrality, can not be considered as a hostile act.

Besides the protection of this common law, Belgium was placed in the position of a neutralized state by the Treaty of 1839, signed at London, by five great Powers: England, France, Austria, Russia, and Prussia. This treaty declares that Belgium shall form "an independent and perpetual neutral state" and that "she will be bound to observe this same neutrality toward all
(1)
other states." The five great powers pledged themselves to guarantee this status. Thus Belgium becomes the ward of Europe and the great Powers become her guardians. The question of the binding force of the Belgian treaty was first raised during the

(1) For texts, see Hertslet, Map of Europe by Treaty, Vol. II, pp. 858-871, 909-912, 979-993, 996-998.

Franco-German War of 1870 when England, fearing that one or both belligerents might disregard it, demanded assurance at this point and succeeded in concluding ancillary treaties for the duration of the Franco-German war and twelve months thereafter, with France and Germany, by which these powers individually pledged themselves to respect the inviolability of Belgium and this they both did.

On July 31, 1914 when war between Germany and France seemed imminent, the English government, adopting the same course of 1870, requested both German and French governments for assurance to respect the neutrality of Belgium so long as no other power violated it. The French government promptly replied, saying that it was "resolved to respect the neutrality of Belgium and it would only be in the event of some other power violating that neutrality that France might find herself under the necessity in order to assure the defense of her security to act otherwise." (1) But from Germany there came no reply. Therefore the English government insisted upon it again on August 1st. In spite of the requests from England the German government sent a note to Belgium on August 2nd, in which it demanded a "benevolent neutrality" by granting a free passage for German Troops through Belgium: in return, the German government promised to guarantee on the conclusion of peace the ownership and independence of the kingdom to its fullest extent." This was rightly and bravely refused by (2) the Belgian government on the next morning. On August 4th

(1) See Garner, American Journal of International Law, Vol. IX, p. 74

(2) Belgian Grey-Book, No. 20, printed in pamphlet of American Association of International Conciliation, January 1915, No. 86, pp. 22-23, 24.

the German troops marched into Belgium on the pretext of French menaces. On the same day, the English government still insisted upon the same assurance that France had given. At once the reply was given by Herr von Jagow, the Imperial secretary of state, that "he was sorry to say that his answer must be no, as in consequence of the German troops having crossed the frontier that morning, (1) Belgium had already been violated".

Undoubtedly, it was a violation of the Treaty of 1839 as well as the law of neutrality. Germany did not deny it. Professor Garner of the University of Illinois has carefully pointed out that "the German government readily admitted that its act was a violation of a treaty to which it was a party and a violation of a long established principle of International Law, but justified the act as one of military necessity." (2) Such an argument of military or strategical interest was put forward in a perfect clear manner by Herr von Jagow in his historic interview with Sir E. Goschen, the British Ambassador, and the latter stated the following:

"Herr von Jagow again went into the reasons why the Imperial Government had been obliged to this step, namely, that they had to advance into France by the quickest and easiest way, so as to be able to get well ahead with their operations and endeavor to strike some decisive blow as early as possible. It was a matter of life and death for them, as if they had gone by the more southern route they could not have hoped, in view of the paucity of roads and the strength of the fortresses to have got through without formidable opposition entailing great loss of time. This

(1) Dispatch of Sir E. Goschen to Sir Ed. Grey, Aug. 8th, 1914, cited Garner, American Journal of International Law, Vol. 9, p. 75.

(2) English White Book, No. 157, cited Garner, A.J.I.L. Vol. IX, p. 77.

loss of time would have meant time gained by the Russians for bring up their troops to the German frontier. Rapidity of action was the great asset, while that of Russia was an inexhaustible supply of troops. (1)

In his speech delivered in the Reichstage on August 4, 1914, the German Imperial Chancellor, Herr von Bethmann-Hollweg made the following statement:

"We are in a state of legitimate defense. Necessity knows no law. Our troops have occupied Luxemburg and have perhaps already penetrated into Belgium. This is against the law of nations. France, it is true, has declared to Brussels that it is determined to respect the neutrality of Belgium as long as its adversary respects it, but we know that France was ready to invade Belgium. France can afford to wait; we can not. A French attack on our flank in the region of the lower Rhine might have been fatal. It is for that reason that we have been compelled to ignore the just protests of the governments of Luxemburg and Belgium. The injustice which we thus commit we will repair as soon as our military object has been obtained." (2)

Here both the Imperial Secretary and the Imperial Chancellor gave no reference to any overt act by France violating Belgian neutrality. Nor did the German correspondence with Belgian and French governments bring forward any evidence to substantiate the supposed French violation previous to German attack.

In its ultimatum to Belgium, August 2, the German government stated that "reliable information has been received by the German government to the effect that French forces intend to march on the line of the Meuse by Givet and Namur." It was therefore, "Germany's imperative duty to forestall the attack

(1) Communication of Sir Ed. Goschen to Sir Ed. Grey, cited Garner, American Journal of International Law, Vol. IX p.77.

(2) Daily Telegraph War Book; How the war began, p.44111, Another translation of the speech printed in a pamphlet of American Association for International Conciliation, Nov. 1914, No.84.

(1) of the enemy." The ultimatum did not state the source or nature of the information and the assertion is supported by no proof. Even when the German minister aroused the Belgian Foreign Office in the dead of night during the period that the twelve hours of the German ultimatum to Belgium were running, because he had been instructed by his government to inform Belgian government that "French dirigible had thrown bombs, and that a French cavalry patrol had crossed the frontier in violation of international law," (2) he could not assert that those violations had occurred on Belgian territory; but he confessed that it was in Germany. A few hours later, Baron von Schoen, the German Ambassador at Paris, in a farewell audience handed a letter to M. Viviani, the French Minister of Foreign Affairs, which reads that "the German administrative and military authorities have remarked a certain number of definitely hostile acts committed on German territory by French military airmen. Several of these latter have manifestly violated the neutrality of Belgium by flying over the territory of that country." (3) This accusation, if substantiated, would be a reasonable justification for Germany to invade Belgium. But unfortunately for Germany's defense on this ground, absolutely no evidence worthy of the name has been forthcoming.

Later the Germans made the charge that as early as July 25th Liege was full of French soldiers. Another charge was made

(1) Belgian Grey-Book No. 20 (July 24-August 29, 1914)

(2) " " " No. 21 (" " " " ")

Both printed in Pamphlet of American Association for International Conciliation, January, 1915, No. 86.

(3) French Yellow Book, No. 147.

that two wounded Frenchmen had been found in Namur who said their regiment, the Forty-fifth, was brought to Namur as early as July 30th. Again there was a further charge that there were quantities of British artillery ammunition stored as early as the year of 1913⁽¹⁾ in Maubeuge, a French fort on the Belgian frontier. If these charges had been in accord with fact, Germany would have been perfectly justified in disregarding the treaty of 1839 as well as Belgium's rights as a neutral state. Unfortunately to these charges the Belgian Minister of War replied that before August 3rd, not a⁽²⁾ single French or English soldier had set foot on Belgian territory. Then all these charges seem scarcely valid unless they are substantiated by facts.

Much has been made of the alleged discovery after the invasion of Belgium of papers indicating that Belgium had ceased to be neutral and was virtually in alliance with France and Great Britain for the protection of Belgium against Germany. In his remarks introductory to the secret papers, Dr. Dernburg stated: "the Imperial Chancellor has declared that there was irrefutable proof that if Germany did not march through Belgium her enemy would. This proof, as now being produced, is of the strongest character."⁽³⁾ This Belgium, France and Great Britain have officially denied and firmly stated that it is of a private and⁽⁴⁾ unauthorized character.

(1) Bernhard Dernburg, Germany and the War, published by the Vaterland, pp. 2, 24, 55.

(2) London Times (Weekly edition) Oct. 2, 1914.

(3) The Case of Belgium, in the light of official reports found in the archives of Belgian Government, with an introduction by Dr. Dernburg and a comment of the North-German Gazette.

(4) A. C. Stowell, the Diplomacy of the War of 1914, pp. 305-411.

From the above attempts at explanation, we find no reference to any overt act by France violating Belgian neutrality and the assertion made by Germany is not supported by any strong proof. It may be well said that the sole argument upon which the German Government relies to justify its action in Belgium is the necessity arising from certainty of French intention and miscalculation of the alleged events. At this point we must not forget that the excuse of necessity can serve as a justification only when there actually is a necessity as we have discussed at a great length in the first two chapters of this essay. Indeed it will not suffice that the one who disregards the ordinary rules supposed such a necessity to exist.

In this present war there was really no necessity for violating the neutrality of Belgium, since France had just recently given her solemn word that she would observe the Belgian neutrality provided Germany followed a like course. It may be conceivable that France might have prepared to invade Germany through Belgium in case of a German violation of Belgian neutrality but this France did not either. The best answer to all the claims and allegations made by Germany is the fact that even after Germany had entered Belgium's territory, it was several weeks before the French troops could come up to render effective

(1) assistance. Furthermore, there was an alternative plan to follow. In a pamphlet "The Truth about Germany" edited by eleven distinguished German writers with the assistance of thirty four

(1) Stowell, The Diplomacy of the War of 1914, pp.418, 520.

other publicists, it stated that "the German nation is involved in a war on two frontiers against France and against Russia. This struggle can only be brought to a successful issue by overcoming first one power with all our strength and then the other." (1)

According to this statement, Germany would have another perfectly feasible plan of campaign, that is to say, she might have confined her offensive operation to the Eastern frontier and remained on the defensive on the West. If she had followed this plan, the Belgian question would not have arisen. Therefore the invasion of Belgium was not necessary to the preservation of the German nation. As to Germany's claim that Belgium was in alliance with France and Great Britain, what has Germany been able to prove?

"Only that British military attaches had concerted with Belgian military authorities plans of joint action against German invasion. If, as is insisted, no consultations were held with German military attachés to provide for the defense of Belgian neutrality against a French or British invasion, what does that prove? Only that the Belgians knew well or guessed rightly on which side their neutrality was menaced." (2) Even granting that such an

alliance were in existence, it is permissible in the eyes of law. Rivier says, "the neutralized state should conclude defensive alliances, not certainly such that would oblige it to defend its ally, but alliances in which the ally would be bound to defend the neutral state." (3) This, however, Belgium did not. If she did, the German Chancellor would not have to admit Germany's guilt.

(1) Truth about Germany, facts about the war, pp. 52-53.

(2) Munroe Smith, Military Strategy and Diplomacy, in Political Science Quarterly, Vol. XXX p. 59 (1915).

(3) A. Rivier, Principes Vol. II p. 60 (1896)

"The wrong, I speak openly, gentlemen, the wrong we have done to
 Belgium will be righted when our military ends are accomplished."⁽¹⁾

To say that on August 3rd, 1914, Belgium had ceased to be neutral and virtually in alliance with France and Great Britain, or her neutrality had been violated by France previous to the German attack is an assumption the proof of which is not yet and never will be forthcoming. If they were so notorious there would be no need of any doctrine of Kriegsraison to justify the German invasion. The historic interview of the Imperial Secretary of State with the British Ambassador and the straightforward declaration of the Imperial Chancellor to the Reichstag have at least the merit of frankness. "Necessity knows no law" appeared in those hours of warlike enthusiasm to be a sufficient excuse for a crime which success would justify. The Reichstag received these words with unanimous applause. The German people thus considered itself satisfied. The German writers and jurists had set to work; they have arranged an argument of notstand or state of necessity to defend the action of their government. Professor Kohler says, "Germany did not threaten the essential interests of Belgium, that the ultimatum drawn up in conformity with the exigencies of notrecht, offered to indemnify Belgium for all the damages caused by German troops and that when the reckoning should be made, of the two alternatives mentioned, the strategical interest of the Empire appeared to be more important than the interest which Belgium might consider implied in the inviolability of her territory and in the respect for

(1) D. W. Johnson, Plain Words from America, p. 35.

her neutrality." (1) In another place, he says again that "Germany might appeal to the right of necessity; this right authorized her to invade Belgium; in regard to this necessity former treaties had no longer any weight." (2) Dr. Dernburg holds the same view; he says, "Treaties must be sacred, Germany has never been charged with violating treaties. It was never proclaimed, except in the Belgian case, that necessity justifies the breaking of treaties." (3) Professor Niemyer of the University of Kiel holds a similar opinion. In one of his recent articles entitled "International Law in War" he has gone to the length of saying that "one is quite right in insisting for those treaties made for the event of war that they are called into operation by a state of war arising, yet one dare not go further and attribute to them too high a degree of validity; one dare not say they are more fire-proof because they are especially made to endure the fire of war. On the contrary, those agreements made for war stand in a most dangerous dependence upon the crisis in international law, which arises as every great war breaks out. They are immediately and seriously threatened by that ruling mistress of war: 'kriegs-raison' which sits in all such agreements hidden like a secret worm that suddenly grows to giant size and swallow the whole thing." (4)

Such an excuse of necessity is entirely irrelegant, for it is irreconcilable with the very object and raison d'etre of

(1) De visser, Belgium's Case, pp. 45-46.

(2) " " " " p. 53.

(3) Dernburg, Germany and the War, p. 21.

(4) Niemyer, International Law in War, in Michigan Law Review, Vol. XIII pp. 173-176.

international law and international treaties. Germany's guilt is universally recognized. It becomes more and more evident that her government has violated the law and that it has miscalculated events. Her plea of necessity to justify the invasion of Belgium may find favor before the House of pharisees, but can not be considered before the Forum of International Law. It has been condemned by all writers as well as by the public of the whole civilized world. Even in Austria and Germany, this dubious justification has not commended itself to impartial minds with the same force. A Dutch professor wrote to the Koelnische Zeitung, saying, "when Germany violated the neutrality of Belgium I was very indignant. But I was partially conciliated" by the Chancellor's plea of necessity. (1) Professor Lemmasch of the University of Vienna, has loudly protested against the violation of treaties in the name of military necessity. (2) Furthermore, it is of special interest to note that the German plea of necessity in the case of Belgium is even contradictory to one of the few rules of war to which the military necessity or kriegsraison of the German General Staff will admit no exception; it says:-

"The belligerent states have to respect the inviolability of the neutral and the undisturbed exercise of its sovereignty in its home affairs, and to abstain from any attack upon the same, even if the necessity of war (or kriegsraison) should make such an attack desirable.(3)

Besides the unjustifiable violation of Belgian neutrality these are numerous lawless proceedings of the German armies in

(1) New York Sun, Dec. 27, 1914, cited Stowell, the Diplomacy of the War of 1914, p. 446 note.

(2) De Visscher, Belgium's Case, p. 54.

(3) Morgan, German War Book, p. 150.

Belgium and France and of the German naval forces at sea. As we pointed out in the preceding chapter, the German Government has given instruction to its soldiers that kriegsraison permits all means of destruction and violence, it is then not a matter of wonder to expect that the German soldiers will not fail to produce examples of conduct suitable to such instructions. In this great war, the breaches of law committed by the German soldiers are very numerous in number. In addition to the violation of neutrality, there are "the refusal to recognize certain legitimately enrolled combatants, the system of terrorism; the bombardment on land, naval and aerial, of undefended places; the indiscriminate destruction and devastation of towns and villages; the deliberate attacks on protected buildings, such as cathedrals and other churches, museums, libraries, hospitals, private dwellings; the unrestrained outrages on the civil population, including women and children; the forcing of civilians to give information, to act as screens against the attacks of their own soldiers, and to perform various prohibited services; the use of dum-dum and explosive bullets, the use of asphyxiating gases, the poisoning of wells, the hurling of blazing petrol; the disregard of the white flag; the abuse of the Red Cross; the illegitimate ruses of war; the lawless application of the arbitrary principle of 'war treason'; the exorbitant requisitions and contributions, the seizure of private property, pillage; the arrest and ill-treatment of hostages, the imposition of collective penalties, the excessive severity and unprecedented arrogance of the commanders and armies during the occupation of their adversaries'

territory; the shooting of prisoners of war and wounded, the attack of a hospital ship; the attack on merchantmen without providing for the security of those on board, the destruction of fishing-vessels; the indiscriminate laying of mines on the high sea, the unwarranted extension of the maritime area of war, implying illegal interference with neutral shipping, and other contraventions of international law."⁽¹⁾

Such unlawful acts as have just been mentioned are not isolated cases, but they are committed repeatedly. What is the excuse offered by the violators for their barbarous conduct? The German soldiers will undoubtedly say that if they are not retaliatory measures they are certainly the measures authorized by "military necessity" or kriegsraison. As we have seen it before, in German mind, kriegsraison is the predominating, the exclusively sovereign factor; everything else must be unhesitatingly sacrificed to its demands. In this great war, as Professor Johnson of Columbia University says, "it was German soldiers who murdered innocent hostages from 'military necessity', who destroyed much of Louvain from 'military necessity', who violated every rule of civilized warfare and humanity in Belgium from 'military necessity', who executed a noble English nurse from 'military necessity', who wrecked priceless monuments of civilization in France from 'military necessity', who have dropped bombs from the sky in the darkness upon the sleeping women and children in unfortified places and slaughtered hundreds of innocent non-combatants from 'military necessity', who sent

(1) Phillipson, International Law and the Great War, pp. 392-393, for details see pp. 142-392.

babies at the breast and their innocent mothers shrieking and strangling to a watery grave in mid-ocean from 'military necessity', and who have defended every barbarous act, every crime against humanity on the specious and selfish plea that it was justified by, 'military necessity'.⁽¹⁾"

Indeed, such an application of the doctrine of military necessity without restriction is directly contrary to the whole trend of human civilization and is in conflict with the entire structure of international law. We have noted in the preceding chapter that military necessity can have no operative force as against positive prohibitions. But, on the contrary, the measures of kriegsraison are akin to the older barbarous methods of making war which were thought to have been banished from the world for ever. Thus it breaks down all the existing conventions and long-established usages of war. It has shocked the whole civilized world and turned the tide of sentiment against Germany more strongly than ever. To conclude, it may be well said that kriegsraison may evade all the laws in existence, but it can not ultimately arrest the judgment which the ideals and the sentiments of mankind dictates.

(1) D. W. Johnson, Plain Words from America, published by Hodder and Stoughton, London, New York and Toronto, 1917.

- * DOCTRINE OF MILITARY NECESSITY * -

* * * * *

CONCLUSION

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The doctrine of military necessity has now been set forth in its essential details. Its interpretation and application in different countries have been explained and we have their respective contentions both in the writings of their own authorities and in the manuals of their own governments. The examples of conduct suitable to such instruction have been brought to the bar of the civilized world.

Now, what the conclusion will be it is not difficult for us to reach. We, students of international law, are to do justice for the world. Our ears are not too greatly deafened by the roar of the cannon nor our eyes too blinded by the smoke of the battle. We should be able to reach a clear and just conclusion "without fear, favor, or affection."

The nature of the conclusion is already apparent, but it may be itemized as follows:

1. In general, the principle of self-preservation is recognized in international law as a justification for certain exceptional actions which would otherwise be unlawful, but is limited to the case of practical necessity for self-defence, instant, overwhelming; leaving no choice of means and no time for deliberation.

2. As to the principle of military necessity, it is sufficiently obvious that the international law of war is always the result of a compromise between the principles of humanity and necessity. Therefore it can have no operative force as

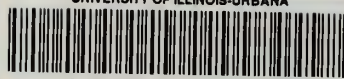
against positive prohibitions. The Hague Conventions and the Manuals of the United States, Great Britain etc., adopt this correct view.

3. The German doctrine of Kriegsraison proceeds upon another theory; the necessity of war overrules the law of war. Although the doctrine is maintained by German writers of authority and officially countenanced by the German government; but it is unanimously reprobated by English and American writers, and not generally accepted by those of other countries even of Germany.

4. The case of Belgium is neither a case of justifiable self-preservation nor one of military necessity. The application of Kriegsraison without restriction is entirely irrelevant, for it is diametrically opposed to the very object and raison d'être of international law and treaties.

5. The unlawful acts of the German armies have shocked the whole world and turned the tide of sentiment against Germany more strongly than ever. From its attempts to cover illegitimate acts by entering the plea of military necessity, in order to justify its case at the bar of public opinion and gain the moral sympathy of the world, it is seen what Jefferson called a "decent respect to the opinion of mankind" is still a mighty factor in human affairs, and may we conclude this discussion in saying that might is not necessarily right, and right is still the sovereignty on earth.

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